



State Administration, Public Retirement, and Veterans' Affairs Interim Committee

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56th Montana Legislature

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COMMITTEE STAFF

SHERI HEFFELFINGER
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DAVID NISS, ATTORNEY
JOANN JONES, SECRETARY

MINUTES

Disability and Retiree Health Care Subcommittee
Capitol Building
Helena, Montana
September 14, 2000

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of documents.**

COMMITTEE MEMBERS PRESENT

Sen. E.P. "Pete" Ekegren, Chairman
Sen. Sue Bartlett

Rep. Matt Brainard
Rep. Tom Dell

STAFF PRESENT

Sheri Heffelfinger, Research Analyst
David Niss, Attorney
Jo Ann Jones, Secretary

VISITORS

Visitors' list, Attachment #1.

COMMITTEE ACTION

- C Approved legislation to be submitted to the State Administration, Public Employees' Retirement, and Veterans' Affairs Committee that creates a disability benefit for DC plan members

- C Approved legislation to be submitted to the State Administration, Public Employees' Retirement, and Veterans' Affairs Committee that creates a medical savings trust account (VEBA)

CALL TO ORDER AND ROLL CALL

Sen. Ekegren called the meeting to order at 1:05. Roll call was noted, see Attachment #2. Sen. Bartlett moved to adopt the minutes of the August 3, 2000, meeting as corrected. The motion passed on a unanimous voice vote.

DISABILITY BENEFITS FOR PERS DC PLAN MEMBERS

Exhibit #1: Disability: Issues and Options Checklist

Exhibit #2: Staff Notes on the Disability Issues and Options Checklist

Exhibit #3: LC DISA

Sheri Heffelfinger, staff, said there are five basic sections on the Issues and Options Checklist: previous decisions, benefits, funding, administrative and startup costs, and effective dates. Included among previous decisions are the recommendation of an employer-sponsored disability plan for defined contribution (DC) plan members, the coverage of all employees of all employers who participate in the Public Employees' Retirement System (PERS), and the extension of current DB plan disability coverage to DC plan participants.

BENEFITS

Ms. Heffelfinger said there are three options under the first section of benefits:

- Option 1: Give new DC plan members the same benefit that a DB plan member receives
- Option 2: Do not define the disability benefit in statute
- Option 3: Let the PERS Board determine the disability benefit

Sen. Bartlett asked if the reason for splitting the pool is because those who transfer to the DC plan still have an inherent contractual right. Ms. Heffelfinger said the primary reason was to avoid confusion, not a concern that both DB and DC plan members be

treated the same. She said the precedent in the state was the voluntary transfers from the Teachers Retirement System (TRS) to the Optional Retirement Plan (ORP) in the University system.

David Niss, staff attorney, said the contractual rights are part of his concerns. It is difficult under current case law to quantify those rights. The substitution of one contract for another and the applicable theory of voluntary relinquishment of the rights of one contract and picking up rights under a second contract makes it difficult to say that it has to be done for contractual purposes. He said he has re-read some of the cases and beyond saying that contractual rights are probably or likely to be there, it is difficult to quantify the degree to which it must be taken account of.

Rep. Brainard said disability coverage is part of the DB retirement system, defined as the retirement system, and that he is not sure that a member does not leave behind those contractual rights when that system is left. Mr. Niss said the cases say that a retirement based upon some state statutes is a contractual right for the people who entered that retirement system. There has been no discussion in the cases about the relinquishment of the benefits of one system and either giving up or transferring those rights to another system because there has been only one retirement system in existence so far. He said there is a difference in the court opinions when the contractual right is defined, whether at joining or at retirement. He said there are only the two cases and they contradict each other.

Rep. Brainard said a 15-year employee who leaves state employment and goes to another employer, leaving his contributions in PERS, left his disability benefits when he left state employment. Mike O'Connor, Executive Director, PERS Board, said an employee would have to be able to prove that disability began while under state employment and that it had continued after termination.

Mr. Niss said Rep. Brainard's analysis makes sense but there is so little guidance in case law that he cannot say that analysis is the correct one. He said the Montana Supreme Court subscribes to the contract theory instead of the gratuity theory for retirement benefits.

Rep. Brainard said that because a disability benefit is paid up until retirement age when it is transformed into a retirement benefit. Because there seems to be a significant difference between the two benefits, disability is not guaranteed when a person transfers to another system.

Ms. Heffelfinger said there are eight retirement systems now and asked if there was experience from transference between systems that could shed a little light on where disability coverage occurs. Mr. O'Connor said service can be purchased from the inactive system and applied to the current system. The employee is no longer covered by the first system for disability because there was no disability at the time of termination.

Rep. Brainard said he would support Option #1, the same benefit an employee would receive under the DB plan. He said the only question is whether that would meet IRS qualification but that option would be preferable for the employees, if it can be legally managed.

Mr. O'Connor said that when employees last had to make an election on retirement systems (February 24, 1991), generally speaking, employees with more than 17 years of service remained with the old formula. He said he does not know how many of those people will be affected by this decision.

Rep. Brainard said the people in that situation should be diminishing in numbers. Employees who are that late in their careers should probably not seriously consider transferring to the DC plan. If the education component works correctly, they should realize that.

Rep. Dell asked if the PERS Board would have the flexibility to address IRS concerns, if Option #3 were to be adopted. Ms. Heffelfinger said if a provision is not qualified by the IRS, the Board would have to approach the Legislature to change it. The IRS examines both statutes and rules. Rep. Dell asked if Option #1 was the safer route for IRS approval. Ms. Heffelfinger said she has received no information about IRS concerns about the amount of benefits, but she is aware that one concern would be in giving the PERS Board too much flexibility.

Rep. Brainard said it makes sense to distribute the risk of disability over the entire pool of employees because it will provide more stability in the long run.

Rep. Brainard moved Option #1, to give new DC plan members the same disability benefit that is provided to DB plan members. Rep. Dell seconded. The motion was approved by unanimous voice vote.

Ms. Heffelfinger listed the following options under the second section for benefits:

Option #1: Transferees to the DC plan receive the same disability benefits as members of the DB plan

Option #2: Transferees to the DC plan receive the same disability benefits as new DC plan members

Option #3: A one-time irrevocable election for a disability benefit plan

Option #4: Receipt of the greater benefit between the DB and DC plans

Option #5: Allow the PERS Board to make the determination

Ms. Heffelfinger said one problem with Option #4 is that it will be unknown which is the greater benefit until disability occurs, and a time must be set when the election must be made.

Rep. Brainard said that, considering the decision just made, it would appear that the system would be better off if Option #2 were to be adopted because it keeps parity for all persons who join the DC plan.

Mr. O'Connor said one thing to keep in mind about fixing the benefit is that contributions have fluctuate. That is one area where the IRS will be concerned because it raises the question of whether this is a DC plan.

Rep. Brainard said that HB 79 provided a fluctuating percentage for the plan choice rate to keep the DB plan whole.

Sen. Bartlett moved to adopt Option #2, the same benefit provided to new DC plan members, because it would avoid establishing tiers in the disability system.

Mr. O'Connor said the DC plan will be submitted to the IRS in late fall so there will be a sense of any issues before the 2001 Legislature adjourns.

Rep. Brainard said that anyone who elects to transfer to the DC plan is also electing to leave behind the disability coverage from the old system.

The motion was approved on a unanimous voice vote.

FUNDING

Ms. Heffelfinger said the options for new DC plan members include:

Option #1: Contributions to the DB trust fund

Option #2: Contributions to a separate trust fund

A. Only for DC disability benefits

B. For both the DB and DC plans disability benefits

Option #3: Contribution allocated to the PERS Board

Rep. Brainard recommended Option #1, for fund stability and for keeping in the spirit of HB 79 to keep the plan whole.

Mr. O'Connor said an IRS decision states that the money in a trust fund has to be used exclusively for the members of that trust. In his opinion, a separate trust for DC plan members must be created.

Sen. Bartlett asked if DC plan members could be considered members of the trust for the limited purpose of disability coverage. Mr. O'Connor said the experience could raise rates for one section of the trust and he is not sure how the IRS would view that.

Rep. Brainard asked if the plan choice rate is flexible over time or if it is frozen at the point when the DC plan goes into effect. Ms. Heffelfinger said it is flexible. Rep. Brainard said that, theoretically, when members transfer from one plan to another, DC plan members are subsidizing the DB trust members because older employees are more likely to become disabled and they are the ones who will remain in the DB plan. Making a disability payment to a DC plan member does not automatically take away from the DB plan members.

Mr. O'Connor said the plan choice rate has a mechanism that makes it fairly constant over time. Just on appearance sake, however, it looks as if it will fluctuate yearly.

Sen. Bartlett said as things stand now, disability coverage is included in normal costs and is reflected in the plan choice rate. Because it is yet unknown how members will elect the DC plan, the 0.43% may not be high enough. If a separate trust is established for the DC plan members, it is as yet unknown whether the 0.43% would manage it because it may be too high or too low.

Rep. Brainard moved Option #1, contributions to the DB plan trust fund to provide disability coverage for new DC plan members. Sen. Bartlett seconded.

Sen. Bartlett said she will support this motion, recognizing that there is jeopardy ahead. She said that some option has to be selected for tax counsel and IRS review.

Rep. Dell said he has similar concerns, but there's not enough information available to make a clearcut decision. He said the option of creating a separate trust fund for DB and DC plans disability benefits appeals to him because it makes tracking more clear.

Rep. Brainard said the option that was just moved is the place to start without definite data as to what will happen.

The motion passed on unanimous voice vote.

The options for current DB plan members who transfer to the DC plan are essentially the same options available for new DC plan members.

Rep. Brainard moved that current DB plan members who elect to transfer into the DC plan be treated the same as new DC plan members. He said that this would keep parity and suggested calling it a disability rate rather than a plan choice rate. Mr. O'Connor said separating it out would cause more fluctuation and said the IRS examines the contributions entering a DC plan.

Sen. Bartlett said it would be made more clear if the disability portion of the plan choice rate is separated and identified, understanding the concerns about fluctuation. She said there will be a lot of pressure to unbundle the plan choice rate.

Rep. Dell said plan members will want to know where the money from their contributions go.

Glen Leavitt, Benefits Director, Office of the Commissioner of Higher Education (OCHE), said that new members in the ORP make attempts to rid of the plan choice rate because they had no involvement in the DB plan.

Rep. Brainard said even if they had been given no option, they would still be paying it.

Sen. Bartlett said that if people want the ability to enter into the DC plan, they must realize that there is a cost associated with that election. No one is forcing them to elect the DC plan.

Ms. Heffelfinger said the selection of a contribution to the PERS DB pooled trust fund from the employer contribution to the DC plan, in the same amount as disability benefits have cost historically (0.43%), to be adjusted as part of the plan choice rate would be consistent with prior action. Rep. Brainard so moved; Rep. Dell seconded.

Sen. Bartlett asked that a notation be made that the Subcommittee would like to identify what portion of the plan choice rate is providing the disability coverage.

The motion passed on unanimous voice vote.

ADMINISTRATION AND START-UP COSTS

The options include:

Option #1: A self-insured trust

Option #2: Purchased insurance

Option #3: Determination by the PERS Board

Ms. Heffelfinger said she does not view the election of Option #3 as being in contradiction to decisions already made.

Rep. Brainard asked if language about purchasing insurance should be in statute because it may create problems for the PERS. He said that purchasing insurance to provide disability benefits seems to be working against oneself because money that could be invested is being spent.

Mr. O'Connor said it's doubtful whether any insurance company would probably bid to provide disability coverage because the state is retaining the determination of disability.

Rep. Brainard said that if statutory language specifies a trust within a DB plan may create a situation that requires management.

Rep. Dell asked if this issue could be struck. Ms. Heffelfinger said language authorizing the PERS Board to administer could be inserted.

Sen. Bartlett moved to allow the PERS Board to administer the program; Rep. Dell seconded. The motion was passed on unanimous voice vote.

Rep. Brainard asked if start-up costs have to be considered because everything is being pooled the way it has always been. Mr. O'Connor said the start-up costs would be considered part of administrative costs but the PERS Board needs the authority to get a loan, if necessary.

Rep. Dell moved that the start-up cost be considered part of administrative costs, paid through an inter-cap loan to the PERS Board, and to be repaid from future administrative fees taken from the DC plan. The motion was approved on unanimous voice vote.

Ms. Heffelfinger said that it may not be necessary to specifically provide for statutory language regarding the use of the DB plan trust funds because of prior decisions made by the Subcommittee.

Rep. Brainard said it should not be necessary because something new is not being created. Mr. O'Connor concurred.

Rep. Brainard moved that specific provision regarding the use of DB plan trust funds not be made in legislation, allowing the PERS Board to make that decision. The motion passed on unanimous voice vote.

EFFECTIVE DATES

The options include making the effective date contingent or not contingent on IRS ruling. Ms. Heffelfinger said another option might be considered, coordinating the effective date with the implementation schedule for the DC plan.

Rep. Brainard said this bill is essentially an amendment to HB 79, so the Subcommittee should try to get IRS rulings and have all components go into effect at the same time.

Mr. O'Connor said this could go into effect at the same time, contingent on IRS ruling, and could be submitted to the IRS with HB 79.

Rep. Brainard moved that the effective date be coordinated with the implementation schedule for the DC plan, contingent on IRS ruling. The motion passed on unanimous voice vote.

CONSIDERATION OF VEBA LEGISLATION

Exhibit #4: VEBA Issues and Options Checklist

Exhibit #5: Staff Notes [for] Issues and Options Checklist

Exhibit #6: LC VEBA

GOVERNANCE - How the VEBA should be established

Ms. Heffelfinger said the consultant, Ice Miller, recommended a centralized approach to avoid the necessity of setting up numerous small trustee entities.

Rep. Brainard said a VEBA seems to be decentralized by its very nature, according to testimony given earlier by consultants. He asked if there are any examples of a centralized system. Ms. Heffelfinger said some states have attempted a statewide approach, but she doesn't know their status in terms of IRS qualification. The local employees/employers who had control had actually opted for affiliation with NationWide.

Rep. Brainard said there are disadvantages associated with contracting with only one vendor, although there are advantages of scale.

Sen. Ekegren asked about employees who transfer around the state, if there are separate vendors. Ms. Heffelfinger said that lack of consistency is one disadvantage of a de-centralized approach. She said that very small employers may have no interest in attempting to contract with very large vendors.

Ms. Heffelfinger said that after discussion with Ice Miller two days ago, it is still not clear whether the group as a whole must participate in the VEBA. The one catch appears to be that the employee must opt out annually, which is an innovative approach that the consultant feels has an even chance of succeeding, although it has not yet been tried. Why other groups have pursued an all-or-nothing approach is unknown.

Rep. Brainard asked if the annual election would be an administrative nightmare to track sick leave if an employees chooses to opt in one year and then opt out the next year.

Sen. Bartlett said she has a concern for small employers. It may be feasible to establish a state level board of trustees and administrative structure that small employers could utilize, but leaving them the option to establish their own VEBAs, if desired. Ms. Heffelfinger said nothing prohibits that now unless specific language would be inserted. Sen. Bartlett said small employers may not be aware of that option without it being pointed out to them.

Rep. Brainard said the bill should be directed toward the state as a single employer, then the VEBA could be made available to other employers, if they desire.

Sen. Bartlett said prior discussion seemed to indicate that it is an all-or-nothing approach, but that no longer seems to be clearcut.

Mr. Niss said he sees no reason, either statutorily or constitutionally, why the state could not mandate local government participation. Rep. Brainard asked if the state could mandate that all employees become members. He said that the first provision is that the program is voluntary, so if the program becomes mandatory, wouldn't that require an employer contribution.

Ms. Heffelfinger said the program must be voluntary, the question is whether the state wants to establish a board of trustees. Mr. Niss said it can be made mandatory that the program be administered at the state level. Rep. Brainard asked if there would be a choice of vendors at the state level. If a single bargaining unit wants a specific vendor, could the board be flexible enough to accommodate that request. Mr. O'Connor said if an employer wants a single vendor, that unit could set up its own VEBA. Rep. Brainard said it can be mandated that they come through the state board. Mr. O'Connor said the decision should be left to the employer.

Rep. Brainard moved to adopt a centralized program for the state as an employer, available to local employers, at their option. The motion passed on unanimous voice vote.

Sen. Bartlett asked how many boards are currently available to become the board of trustees. Ms. Heffelfinger said this decision could be left until later. She said she thinks the individual retirement boards are the most likely to administer the plan. David Senn, Teachers Retirement System (TRS), said the administration of a VEBA is very specialized area of expertise and might be less expensive to contract with an existing organization.

Rep. Brainard said one possible avenue would be to designate a program administrator, who would be required to contract with an already established organization.

Sen. Bartlett moved that option, designating the Department of Administration as the program administrator. The motion passed on unanimous voice vote.

SCOPE

The options include: only state employees, only PERS members, members of certain retirement plans that are specified, or all public employees.

Rep. Brainard said it should be mandatory that any state employer who wishes to participate must go through the state board.

Rep. Dell said this is a facilitative process from the top down, not the bottom up.

Sen. Bartlett said she envisions it as similar to participation in PERS where a contract is signed between the administrator and the local governmental entity.

Ms. Heffelfinger said the Subcommittee is now at the last option, all public employees.

Rep. Brainard moved that all public employees are eligible to participate in the VEBA.

The motion passed on unanimous voice vote.

PROGRAM ADMINISTRATION

Ms. Heffelfinger said this decision was made in a prior motion, designating the Department of Administration as program administrator.

HOW EMPLOYER PARTICIPATION WILL BE DETERMINED

The options include:

Option #1: Employers would have the right to opt in or out, with the understanding that employees with already established VEBA account would continue to have access to those accounts until the balances have been exhausted

Option #2: Employees should vote on whether the employer participates

A. How many

1. A set number of employees should have to initiate the request
2. A certain percentage of employees should request an election
3. A number and a percentage, whichever is less, should request an election

B. What constitutes a majority

1. A simple majority
2. A super majority, specifying 2/3 or 3/4 of the total vote voting "yes"

Ms. Heffelfinger said Ice Miller recommends allowing the employer to determine participation because of questions involving the validity of elections in regard to education and communication.

John McEwen, State Personnel Division, asked how "employer" is defined. He suggested that the state as a whole is designated as the employer, thereby allowing the employees to form their own organizations, which will generally be determined by bargaining unit. Ms. Heffelfinger said one option under employee participation does not require employee associations. Rep. Brainard said the problem with allowing people to opt in and out at will creates a long-term problem.

Ms. Heffelfinger said by leaving the option at the employer level, the individual decisions by employees is only whether sick leave is converted to the VEBA. The employees cannot opt in and out of the trust.

Rep. Brainard moved Option #2, that employees should vote on whether the employer participates in the VEBA.

Mr. McEwen said the definition of state agency is critical. Rep. Brainard said every agency is appropriated a specific number of FTEs, which makes them employment units. Mr. McEwen said that would mandate nothing smaller than a department.

Sen. Bartlett said her preference is that each employee makes the decision, rather than the group, because individual situations apply.

Rep. Dell said he prefers Option #2 because the employees retain fundamental control.

Sen. Bartlett asked if there is a balance further on because it's the employee's responsibility to consider the employer's financial capability. Rep. Dell said prior discussion indicated that the cost would be negligible. Rep. Brainard said an employer must pay retirement and social security on sick leave that is cashed out, and that is avoided by contribution to a VEBA. The cost would be mitigated if employees phased in sick leave contributions.

Sen. Bartlett said she could support this motion if sensitivity to the fiscal impact on employers is shown later on.

Rep. Brainard called for the question. The motion passed on unanimous voice vote.

Rep. Brainard moved a 25% employee trigger.

Mr. McEwen recommended a 10% or 25 employee trigger, considering the size of some departments.

Sen. Bartlett said she concurred with Rep. Brainard.

The motion passed on unanimous voice vote.

Sen. Ekegren said a simple majority vote sounds reasonable.

Rep. Brainard moved that a simple majority vote would be sufficient to trigger an election to the program. The motion was approved unanimously by voice vote.

HOW EMPLOYEE PARTICIPATION WILL BE DETERMINED

The options include: by employer decision to participate, by employee association, or by the individual employee.

Sen. Bartlett moved individual participation.

Rep. Brainard opposed the motion, saying that in dealing with a VEBA, one must deal with more than sick leave issues. Individual participation fragments the VEBA's potential and will create a bookkeeping nightmare.

Sen. Bartlett said employees not already members of a bargaining unit would then have to create an association. Rep. Brainard said there are not many so it could easily be done.

Rep. Dell said he liked the idea of the employees having the ability to trigger the election of the VEBA and also having individual participation. He said the bookkeeping would probably be similar to that for the deferred compensation program.

FUNDING

Rep. Brainard asked Rep. Dell if he envisioned the accounts being funded through sick leave only. Rep. Dell deferred the question to Mr. McEwen, who said that he would like to see employees having the option of contributing a percentage of a raise or a portion of annual leave in addition to sick leave contributions.

Ms. Heffelfinger said individual participation is definitely tied to sick leave contribution.

Rep. Brainard said it would be satisfactory if the only possible method of contribution was sick leave. All the employees of the group should be included if other methods of contribution are to be bargained for.

Rep. Dell said he agreed that the other employees would be in the VEBA, but could decide individually whether to contribute unused sick leave.

Rep. Brainard moved a substitute motion that participation would be by employee associations, with the understanding that sick leave contribution is an option left open to the individual employee.

Ms. Heffelfinger said Ice Miller did not address this option specifically, so it is unknown whether the IRS will allow it.

Rep. Brainard said the real value of the VEBA lies in its collective bargaining power, not the sick leave itself, because the 25% of unused sick leave is not a very large amount.

The motion passed on unanimous voice vote.

Ms. Heffelfinger said there is some difficulty in determining how employee associations are formed, although the bill provides some general guidelines. One option is to leave it as is, allowing the employees to align themselves with collective bargaining units. The problem with that is how to include those who are not members of a bargaining unit.

Rep. Brainard moved to adopt language that provides for individuals who are not represented by a collective bargaining unit to be able to form an association of their own for purposes of starting a VEBA. The motion passed on unanimous voice vote.

Rep. Brainard said that 60 hours of retained sick leave is not an adequate buffer, that it should be at least 120 hours, although 60 days is too much because it prevents people from participating right away.

Rep. Brainard moved that the sick leave threshold be 120 hours.

Sen. Bartlett said maternity leave and sudden medical emergencies must be taken into account. If everything over 120 hours is converted, then 120 hours isn't enough for those situations. She said she wouldn't vote for this motion unless provision is made for people not to lose all sick leave over the 120-hour balance.

Sen. Ekegren asked Sen. Bartlett what she would like to see as a threshold. Sen. Bartlett said 60 days of sick leave.

Sen. Ekegren asked for public comment. Mr. McEwen said he wouldn't want anything less than 120 hours. Mr. O'Connor said he thinks 120 hours is a little low, but did not have any other recommendation.

The motion passed on unanimous voice vote.

Rep. Dell moved to keep the cash out amount on sick leave at 25%. The motion passed on unanimous voice vote.

Ms. Heffelfinger said the consultant's recommendation for the timing of contributions is annually.

Rep. Brainard said an annual contribution is a large fiscal impact on the employer, so he moved to designate a contribution by pay period, with an option for the maximum contribution and the threshold.

Mr. McEwen said it might be difficult to administer contributions every pay period. He said it might be better done on a quarterly basis, with a turn-around form.

Ms. Heffelfinger said there are two policy considerations: a staggered fiscal impact on the employer, and maximizing the employee's chances for contribution. The employee

would have to elect every pay period, which would have a tremendous impact on the payroll personnel.

Rep. Brainard said the IRS apparently wants a standard contribution, and asked if an annual election isn't almost a cash contribution.

Rep. Dell said he prefers an annual election, with a deduction every pay period.

Sen. Bartlett asked how feasible this would be with the current payroll system. Mr. McEwen said anything is possible, but it might require a software modification. He said that sick leave is more difficult to calculate than a FlexPlan deduction. Sick leave becomes more expensive as salaries go up, which is one advantage to keep the contribution on a bi-weekly basis.

Sen. Bartlett asked what the default position would be if someone fails to make an election. Ms. Heffelfinger said Ice Miller was clear that contributions are mandatory if an election is not made. She said that it must be made clear that mandatory draws on sick leave can reduce their available balance to 120 hours.

Rep. Brainard offered a substitute motion, moving that contributions would be made each pay period, but the amount of the contribution would be determined once each year. The motion passed by unanimous voice vote.

Rep. Dell moved that unused annual leave cannot be a funding source, retaining the issue for a possible bargaining point at some point in the future.

Rep. Brainard said not allowing contributions of unused annual leave prevents employees from not taking any time off. Encouraging employees not to take vacations in this fashion will adversely affect the employer in the long run.

Rep. Brainard called the question. The motion passed on unanimous voice vote.

Rep. Dell moved that termination pay not be allowed as a funding source. The motion passed on unanimous voice vote.

NEW POOLED SICK LEAVE PROGRAM

The options include:

Option #1: Do not create a new sick leave program

- A. Leave current laws unchanged
- B. Clarify that only non-VEBA members participate in current programs
- C. Clarify that any state employee can participate

Option #2: Create a new pooled sick leave program

- A. Participation
 - 1. Mandatory
 - 2. Voluntary
 - 3. Determined by the program administrator through rules
- B. Program design
 - 1. Determined by the program administrator
 - 2. Determined by each employer
 - 3. Specified in statute

Rep. Brainard moved that a new pooled sick leave program not be created, leaving current laws as is.

Sen. Bartlett offered a substitute motion of not creating a new pooled sick leave program, but clarifying in statute that any state employee can participate in the existing program, whether or not that employee is a VEBA member. Rep. Brainard accepted the substitute. The motion passed on unanimous voice vote.

INVESTMENT AND USE OF ACCOUNTS

The options on the type of VEBA program are whether it should be a DB or a DC program.

Sen. Bartlett moved that it should be a DC program. The motion passed on unanimous voice vote.

The options on how the investments should be managed are: through contracted services, by the Montana Board of Investments, or by decision of the VEBA board of trustees.

Rep. Brainard moved that the investments should be managed through contracted services, primarily leaving it to the discretion of the Department of Administration. The motion was adopted by unanimous voice vote.

Ms. Heffelfinger said the number of investment choices is a policy issue. Sen. Bartlett moved leaving the decision of how many investment choices to offer to the Department of Administration. The motion passed on a unanimous voice vote.

Rep. Dell moved that the VEBA account funds be restricted to all qualified health care expenses listed in the IRS code. The motion passed on unanimous voice vote.

Rep. Brainard moved that VEBA members be allowed to access their accounts at any time, whether actively employed or retired. The motion passed on unanimous voice vote.

The options on how beneficiaries should be dealt with include:

Option #1: Not addressing the issue, forfeiture of account upon member's death

Option #2: Specifying a death benefit in statute

Option #3: Providing for a death benefit, but specified in rules by the administrator

Rep. Brainard asked if a death benefit is a cash sum that is taxable. Mr. O'Connor said it is taxable on a DC plan, but the benefit can be rolled over by the spouse. It is still taxable for the children, however. Mr. McEwen said he thinks the beneficiaries could continue to use the money for qualified medical expenses. Ms. Heffelfinger said the

plans are created for the benefit of employees and their dependents, but she is not sure of the distinction between dependents and beneficiaries.

Rep. Brainard moved to specify a death benefit in statute, providing that anyone can be named as beneficiary, subject to IRS rules.

Sen. Bartlett said her first choice is that dependents could continue to use the account. The way to establish the beneficiary should be the same one that is used for one's final paycheck.

Rep. Brainard said the VEBA account is essentially the person's property and should be disposed of in any way the person elects.

Sen. Bartlett asked Rep. Brainard if he would prefer to establish the death benefit in rules, rather than in statute. Rep. Brainard said he does not believe a death benefit should be established by rule because the account is part of a person's estate.

Rep. Brainard clarified his motion to state that statutory death benefits are to be worded in such a manner that protects the health benefits of the dependents and, if there are no dependents, the account be considered part of the member's estate. The motion was adopted by acclamation.

ENFORCEMENT

The issue is whether the bill should provide for a penalty for fraudulent claims. The options include:

Option #1: No, existing applicable criminal laws would apply

Option #2: Yes

A. Criminal penalty

1. Expressly state d in a new section
2. Through reference to another criminal penalty in another MCA section

B. Civil penalty

Rep. Brainard said that members who file fraudulent claims are, in effect, defrauding themselves. If caught, the IRS will demand that taxes be paid on those funds which will probably be penalty enough. Another angle is if a medical professional colludes in committing the fraud, but that should already be covered in other statutes.

Rep. Brainard moved that no specific provision be made to penalize fraudulent claims.

Sen. Bartlett said she does not want to criminalize this, but does believe it should be made non-rewarding to defraud the system. She suggested that the member should forfeit the amount that was defrauded, or possibly kicked out of the system.

Rep. Brainard said the person probably would not be terminated from employment, and the IRS problems would be significant.

Sen. Bartlett called for the question. The motion passed on unanimous voice vote.

IMPLEMENTATION

The issue involves the IRS qualification and effective dates.

Rep. Brainard moved that the program should not be effective unless or until a favorable IRS ruling has been received. The motion was passed on unanimous voice vote.

Rep. Dell moved that the program administrator may obtain a loan from the Department of Administration. The motion passed on unanimous voice vote.

Ms. Heffelfinger said the issue of PERS trust funds that is outlined in the Issues and Options Checklist is no longer relevant.

SPONSORSHIP

Rep. Brainard said that he, as presiding officer of the full committee, will make assignments on all bills that are approved by the full committee. Sen. Ekegren agreed.

OTHER BUSINESS

Ms. Heffelfinger said Sen. Hargrove has requested that the subcommittee reports be moved to the morning of the meeting of the full committee because he has to leave early. Rep. Brainard said he would prefer leaving this subcommittee's report until the afternoon, so will try to process half the retirement proposals in the morning along with the Military and Veterans' Affairs Subcommittee report.

ADJOURNMENT

Rep. Dell moved to adjourn. The meeting was adjourned at 7:55 p.m.

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